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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANIEL S. COSTELLO, et al.,

Petitioners

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Can the United States gain an avigation easement by adverse possession when it denies that there are aircraft overflights above the property in question?

2. When does the statute of limitations begin to run concerning a claim that aircraft overflights have taken property without just compensation in violation of the Fifth Amendment, when the airport operator's intentions to take a permanent easement are not known or ascertainable?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF CLAIMS

Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Claims entered in this proceeding on June 4, 1982.

OPINION BELOW

The opinion of the Court of Claims

has not been reported and is reproduced as Appendix A.

JURISDICTION

This petition for a writ of certiorari was filed within 90 days of the date that the Court of Claims issued its decision. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can the United States gain an avigation easement by adverse possession when it denies that there are aircraft overflights above the property in question?

2. When does the statute of limitations begin to run concerning a claim that aircraft overflights have taken property without just compensation in violation of the Fifth Amendment, when

the airport operator's intentions to take a permanent easement are not known or ascertainable?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> No person shall be . . . life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Thirteen petitioners live in ten residential properties in the District of Columbia and Maryland which lie directly under the flight path to Washington National Airport. The homes were acquired in 1941, 1946 1951/ 1952, 1957, 1970(2), 1975, 1977 and 1978(2).

Washington National Airport opened in 1941 to propeller aircraft. In 1966 jet aircraft were introduced.

Since 1972 the United States Department of Transportation and the Federal Aviation Administration have been seeking to establish a policy for the use of Washington National Airport. See 46 Fed. Reg. 36069 (July 13, 1981).

The respondent has at all times, denied that there are overflights above petitioners' properties.

Respondent has maintained that the flight paths to Washington National Airport, and the types of aircraft using the airport, have remained essentially constant since 1966.

Petitioners filed suit in the United States Court of Claims in 1980 alleging, inter alia, that the over-

flights constituted a taking of property under the Fifth Amendment because the flights were so low and so frequent that petitioners have been deprived of peaceful use and possession of their property.

Respondent, and the court below, contend that if a taking occurred it occurred in 1966 and the statute of limitations bars recovery.

Petitioners contend that the taking did not occur until the intentions of the government are known or ascertainable. And even if the government's intentions are known or ascertainable, and the government gains title to an easement by adverse possession, that it must record this easement to put future owners on notice. Without recorded notice petitioners bought the

land without an easement, and therefore the current overflights constitute a taking of property to which they are entitled to just compensation.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims permits the Federal Government to take property by inverse comdemnation without compensating either the present or past homeowners. The very evil sought to be curbed by the Fifth Amendment, that of the Federal Government trampling private property rights of ordinary citizens, has been rubber stamped by the Court of Claims.

I. THE DECISION OF THE COURT OF CLAIMS IS IN CONFLICT WITH THE DECISION OF SUPREME COURT IN UNITED STATES v. DICKINSON, 331 U.S. 745 (1947).

This court ruled that a cause of action for a taking of private property does not accrue until conditions have reached the state where the extent of the government's use of and interference with the property is known or ascertainable. United States v. Dickinson, 331 U.S. 745 (1947).

The extent of the Federal Government's future use of Washington National Airport is not fully known or ascertainable even as of the date that this brief is filed. The Federal Aviation Administration recently stated:

> For approximately ten years, the U.S. Department of Transportation and the FAA have been seeking to establish an appropriate policy to guide

the management and operation of Washington National and Dulles International Airports. Once a role for each airport, in meeting the Washington metropolitan area's air transportation needs is clearly defined, it will be possible for the FAA to move ahead with necessary improvements to the facilities at Washington National while continuing to make timely improvements to Dulles. An understanding of the role of each airport is necessary to assure that the investment in improvements and management of present facilities are consistent with the area's needs.

46 Fed. Reg. 36069 (July 13, 1981).

The Government's intention concerning use of airspace over plaintiff's homes is less than ascertainable. In United States v. Dickinson, supra, the Supreme Court ruled that the statute of limitations does not begin to run concerning a Fifth Amendment taking claim until the extent of the "taking" is certain and final. Justice Frankfurter, writing for the court ruled:

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose land and flowage easements. By such proceedings it could have fixed the time when the prop-

> erty was "taken". The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could not longer be in controversy. 331 U.S. at 747, 748.

The Dickinson case involved a process of flooding private lands over a period of years. The instant case involves the continued use of private property for aircraft overflights. Justice Frankfurter continued:

> The Fifth Amendment expresses a principle of fairness and not a technical rule of pro-

cedure enshrining old or new niceties regarding "causes of action" when they are born, whether they proliferate, and when they die.

* * *

The source of the entire claim -- the overflow due to rises in the level of the river -- is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of and flooded by the government would not unnaturally postpone bringing a suit

> against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.
> 331 U.S. at 748, 749.

Petitioners have suffered from a continuous flood of aircraft noise. They have postponed suit until the depth of the flood manifested itself and they began drowning in the tide that has devastated the use of their property. Under Dickinson the statute of limitations does not bar petitioners from proceeding to prove their damages.

The Court of Claims, in Klein v. United States, 152 Ct. Cl. 221, cert. denied, 366 U.S. 436 (1961), applied the principles of Dickinson, supra, to

aircraft overflights. The Court of Claims stated:

> we do not think that the extent of the easement of flight had been ascertained when jets first began to fly over plaintiff's property. 152 Ct. Cl. at 223.

The Court below ruled that the government had acquired an easement in 1966 when jets first began to use National Airport. This holding is directly contrary to the ruling of Dickinson and Klein and a writ of certiorari should therefore issue to resolve this important issue.

II. THE DECISION OF THE COURT OF CLAIMS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF WASHINGTON IN

PETERSEN V. PORT OF SEATTLE, 618 P. 2d 67, 94 Wash. 2d 479 (En Banc, 1980).

The Supreme Court of Washington recently ruled that there is no statute of limitations for filing a constitutional claim for a taking of property by aircraft overflights. Petersen v. Port of Seattle, 618 P. 2d 67, 94 Wash. 2d 479 (En Banc, 1980). The court stated:

> entities clothed with the power of eminent domain should not be permitted to acquire the property of a private citizen by adverse possession and thus avoid payment of just compensation.
>
> 618 P. 2d at 71.

The court in Petersen added:

> Because of taking or damaging of plaintiffs' property is of constitutional magnitude, mere passage of time alone does not bar plaintiffs' cause of action.
>
> 618 P. 2d at 69.

Because aircraft overflights involves interstate commerce there should be uniform national standard regarding compensation for these overflights. Otherwise, certain airports which do not have to compensate landowners, will have an unfair competitive advantage which will interfere with interstate air travel.

III. CONCLUSION

Because this case involves important questions of Federal Constitutional law, and because hundreds of thousands

of homeowners are affected by aircraft overflights, certiorari should be granted to review the decision of the Court of Claims.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 225-80L

DANIEL S. COSTELLO, ET AL.	)	
	)	
v.	)	Accrual
	)	of taking
THE UNITED STATES	)	claim.
	)	

June 4, 1982

Joel D. Joseph, attorney of record, for plaintiff.

Dorothy R. Burakreis, with whom was Assistant Attorney General Carol E. Dinkins, for defendant. Edward Faggen and David L. Bennett, Federal Aviation Administration, of counsel.

Before FRIEDMAN, Chief Judge, NICHOLS and KASHIWA, Judges.

ORDER

This case is before the court without oral argument on defendant's motion for summary judgment.

Plaintiffs herein are homeowners in the Washington, D.C., area. Their petition seeks just compensation for an avigation easement defendant allegedly has taken by allowing flights to and from Washington National Airport (WNA), which defendant owns, to operate over plaintiffs' properties. Although such flights generally are not by defendant's aircraft and are not crewed by defendant's personnel, plaintiffs claim the principles of United States v. Causby, 328 U.S. 256 (1946), nevertheless require defendant to pay compensation. Inter alia,

defendant contends the 6-year statute of limitations of 28 U.S.C. § 2501 (1976) bars plaintiffs' claims. We agree the statute of limitations bars these claims and therefore treat the motion for summary judgment as one for dismissal.

We assume arguendo that regulation of landings and take-offs at an airport defendant owns, such as WNA, may constitute a taking of an avigation easement for which compensation is owed. Compare, e.g., Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P. 2d 664 (1960) (Port of Seattle held liable, as operator of Seattle-Tacoma Airport, for the taking of avigation easements). We have previously held that an avigation easement is taken

when aircraft are first operated regularly and frequently at low altitudes over a parcel of land with the intention of continuing such flights indefinitely. E.g., Lacey v. United States, 219 Ct. Cl. 551, 559, 595 F. 2d 614, 618 (1979); Adaman Mutual Water Co. v. United States, 143 Ct. Cl. 921, 924, 181 F. Supp. 658, 660 (1958). The affidavits supporting defendant's motion are clear that (1) the aircraft presently operating at WNA, with one minor exception, have been in continuous operation since 1966, (2) the altitude and flight paths of such aircraft have not changed materially since 1966, (3) the number of flights per hour into and out of WNA has not changed appreciably

since 1966, and (4) the hours at which WNA is operated have remained largely unchanged since 1967. Defendant's affidavits also indicate that the constancy of these facts is at least partially explained by the High Density Rules the Federal Aviation Administration has promulgated for traffic intense airports such as WNA. Those Rules are presently contained at 14 C.F.R §§ 93.121-93.133 (1981). See also 14 C.F.R. § 159.40 (1981). Under our case law, defendant's affidavits show that a taking occurred, if at all, no later than 1967. See Lacey v. United States, supra, 219 Ct. Cl. at 559, 595 F. 2d at 618-619. See also Joseph v. Bond, 507 F. Supp. 453, 454 (D. D.C.), aff'd, No. 81-1276 (D.C.

Cir., Dec. 16, 1981).

Plaintiffs offer no affidavits of their own to controvert the facts defendant's affidavits set out. Instead, plaintiffs rely on general allegations that operations at WNA in fact have increased significantly in recent years and that defendant's alleged taking only recently has been manifested through unbearable noise. Thus, plaintiffs claim, the cause of action for compensation only now has arisen. See, e.g., Klein v. United States, 152 Ct. Cl. 221, 224, cert. denied, 366 U.S. 936 (1961). See also United States v. Dickinson, 331 U.S. 745, 747-749 (1947). Plaintiffs' theory, however, must fail. Where one party, here the defendant, has pre-

sented various facts by proper affidavits, the other party cannot raise a triable issue merely by alleging contrary facts. Instead, the party asserting that the facts are contrary must employ detailed and precise affidavits of its own which set forth with particularity the facts it claims are in dispute. See, e.g., Rule 101(f); Allen v. United States, Ct. Cl. No. 100-80C (order entered October 27, 1981, at 3); Foote Mineral Co. v. United States, 228 Ct. Cl. ____, ____, 654 F. 2d 81, 87 (1981), and cases cited thereat. Only then will a triable issue be raised.

Plaintiffs here have thus raised no triable issue as to when their claims accrued. Based on defendant's affida-

vits, we conclude defendant took an avigation easement, if at all, no later than 1967. As plaintiffs' petition was filed in May 1980, 28 U.S.C. § 2501 clearly bars this action. Plaintiffs' remaining contentions have been fully considered and found also to be with- out merit.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment, which we have treated as one for dismissal, be and is hereby allowed. The petition is dismissed.

BY THE COURT

Shiro Kashiwa
Judge

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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DANIEL S. COSTELLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the Court of Claims' dismissal of their action to recover "just compensation" for the alleged taking of avigation easements over their properties by aircraft operating out of Washington National Airport.[1] The Court of Claims correctly held that this suit was barred by the six-year statute of limitations contained in 28 U.S.C. 2501 (Pet. App. 1a-8a).

1. Petitioners filed this action in May 1980, alleging that flights over their properties by aircraft operating out of Washington National Airport had so impaired their use and enjoyment of their properties that they were entitled to compensation under *United States* v. *Causby*, 328 U.S. 256 (1946) (Pet. 4-5; Pet. App. 2a). The United States responded with a motion for summary judgment based on

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[1]The overflights of which petitioners complain generally are not by United States' aircraft nor are they crewed by federal personnel (Pet. App. 2a). Washington National Airport, however, is federally-owned and is operated by the Federal Aviation Administration ("FAA").

affidavits showing that no significant change in frequency, altitude, flight paths, or types of aircraft operating out of National had occurred since 1966, and that the airport's hours of operation had remained "largely unchanged" since 1967 (Pet. App. 4a-5a). Petitioners offered no affidavits of their own to controvert the facts set out by the United States (Pet. App. 6a). Accordingly, on the uncontested facts, the Court of Claims held that "a taking occurred, if at all, no later than 1967" (Pet. App. 5a).[2]

2. The failure of petitioners to meet their burden of demonstrating a triable issue of fact concerning the date of the alleged taking is dispositive of this case. See Pet. App. 7a; see also Fed. R. Civ. P. 56(e). Each of the cases on which petitioners rely (Pet. 6-15) involves the question of ascertaining the date of taking where the government's conduct has imposed an *increasing* burden on the plaintiffs' properties. See *United States* v. *Dickinson*, 331 U.S. 745, 746-749 (1947); *Klein* v. *United States*, 152 Ct. Cl. 221, 223-224, cert. denied, 366 U.S. 936 (1961); *Petersen* v. *Port of Seattle*, 94 Wash. 2d 479, 486, 618 P.2d 67, 69, 71 (1980) (en banc).[3] By contrast, petitioners made no attempt to prove

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[2]The court followed its prior decisions to the effect that (Pet. App. 3a-4a)

> an avigation easement is taken when aircraft are first operated regularly and frequently at low altitudes over a parcel of land with the intention of continuing such flights indefinitely.

[3]Petitioners rely on *Petersen* v. *Port of Seattle*, *supra*, as establishing a rule that "there is no statute of limitations for filing a constitutional claim for a taking of property by aircraft overflights" (Pet. 14). In *Petersen*, however, the en banc Washington Supreme Court was construing Washington State law. See 94 Wash. 2d at 486, 618 P.2d at 70. In any event, this Court already has applied the federal statute of limitations, 28 U.S.C. 2501, to bar untimely claims for just compensation under the Fifth Amendment of the United States Constitution. *Soriano* v. *United States*, 352 U.S. 270, 271 (1957).

that any change in flight paths, increase in flights, or use of appreciably noisier aircraft had occurred since 1967. See Pet. App. 6a. Accordingly, the Court of Claims correctly held that petitioner's action, which was filed in 1980, was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. See *Lacey* v. *United States*, 595 F. 2d 614, 618-619 (Ct. Cl. 1979). See also *Branning* v. *United States*, 654 F. 2d 88, 101 (Ct. Cl. 1981); *Davis* v. *United States*, 295 F. 2d 931, 932-934 (Ct. Cl. 1961); *Bacon* v. *United States*, 295 F. 2d 936, 937-939 (Ct. Cl. 1961).

Petitioners' reliance (Pet. 4, 7-8) on recent changes in FAA regulations governing the operation of National Airport is wholly misplaced. The new rules are intended to reduce the noise impact of National's operations without substantially changing the operational character of the airport.[4] Recent governmental actions intended to *reduce* the burden on petitioners' properties—the very interference with their property rights that formed the basis for their allegation of a taking—surely can neither create nor revive that cause of action.

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[4]The proposed rules cited by petitioners (Pet. 7-9) are now final. 46 Fed. Reg. 58036 *et seq.* (1981), 14 C.F.R. Parts 93 and 159. The final rules reduce the number of air carrier operations per hour, limit the total number of passengers per year, and impose a noise level based curfew that permits only "relatively quiet aircraft" to operate between the hours of 10 p.m. and 7 a.m. See 46 Fed. Reg. 58038 *et seq.* (1981).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

REX E. LEE
Solicitor General

NOVEMBER 1982

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[5]The Court recently denied a petition for a writ of certiorari filed on behalf of counsel for petitioners in this case that presented virtually the same issues raised here. *Joseph* v. *Helms*, No. 81-1757 (June 14, 1982).

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